86-851

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAMES C. "JACK" BRIGGS,

Petitioner,

v.

ESTATE OF LAWRENCE E. HAGEN,
A. CONSUELO S. HAGEN AND LYNN G. YOUSE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION

Whether Petitioner can be liable for common law fraud and exemplary damages where Respondents invested in an oil and gas well without Petitioner's knowledge or participation, and Respondents admit Petitioner was not relied upon and had nothing to do with their investment decisions.

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v.

ESTATE OF LAWRENCE E. HAGEN,
A. CONSUELO S. HAGEN AND LYNN G. YOUSE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

JAMES C. "JACK" BRIGGS, the Petitioner herein (hereinafter referred to as "Briggs"), prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above matter on June 16, 1986. The Petition for Rehearing from that Court was denied on August 13, 1986.

OPINIONS BELOW

The June 16, 1986 Opinion of the Court of Appeals, whose Judgment Briggs asks this Court to review, is unreported and is

reprinted in the Appendix to this Petition at pps. 23-43. The Judgment of the United States District Court is reprinted in the Appendix at pps. 20-22.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on June 16, 1986. Briggs' Petition for Rehearing was denied on August 13, 1986. A copy of such denial is reprinted in the Appendix at pps. 46-48. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254.

QUESTION

Whether Petitioner can be liable for common law fraud and exemplary damages where Respondents invested in an oil and gas well without Petitioner's knowledge or participation, and Respondents admit Petitioner was not relied upon and had nothing to do with their investment decision.

THE LAW INVOLVED

This case involves the application of common law fraud in Texas, the requirements of which are as follows:

> ". . . (1) the charged party made a false material representation that consisted of either a positive untrue statement of material fact, concealment of a material fact, or nondisclosure of a material fact that the charged party had a duty to disclose; (2) the charged party knew that the material representation was false or made it recklessly without any knowledge of its truth; (3) the charged party made the false material representation with the intent that it should be acted upon by the charging party; (4) the charging party acted in reliance thereon; and (5) the charging party thereby suffered an injury . . ."

Chemetron Corporation v. Business Funds, Inc., 682 F.2d 1149, 1171-1172 (5th Cir. 1982), reh. den. en banc, 689 F.2d 190 (5th Cir. 1982), vacated on other grounds 460 U.S. 1007, 103 S.Ct. 1245, 75 L.Ed.2d 476 (1983); *South Hampton Co. v. Stinnes Corporation*, 733 F.2d 1108, 1120 (5th Cir. 1984).

STATEMENT OF THE CASE

This petition is filed by Briggs with respect to a Judgment for actual and punitive damages entered against him with respect to the drilling and completion of a well known as the "Scheble Well," which Briggs had nothing to do with. Briggs submits that this is a case where a lengthy and complicated jury charge confused the jury.

In the late 1970s, Briggs formed USEMCO, INC., a Nevada corporation, headquartered in Dallas, Texas. USEMCO was engaged in the business of promoting, syndicating, and operating oil and gas limited partnerships. The individuals sharing control and responsibility in USEMCO were Briggs, together with Messrs. John Wilson and Aalon Ferguson, an attorney.

Briggs, on two separate occasions in July of 1980, had conferences with Lawrence Hagen, his spouse, Consuelo Hagen, and their daughter, Lynn Youse (such Respondents being hereinafter referred to as the "Hagens"), in order to induce them to invest in a drilling program called the "Six Well Program." The Hagens invested in the Six Well Program on or about August 4, 1980, in accordance with their Subscription Agreements (Pf. Exs. 115-117). These instruments were made after the Hagens' tax attorney, Jerome Miller, had reviewed the applicable documents. Under the terms of the Subscription Agreement, the Hagens and their daughter were to pay for the program as follows: Ten Percent (10%) upon subscribing; Forty Percent (40%) when the drilling rig moved onto the locations; and the remaining Fifty Percent (50%) when the wells were completed.

On December 8, 1980, Briggs sold all of his stock in USEMCO to John Wilson for $500,000.00 and a casing point election on the Six Well Program. The casing point election allowed Briggs to determine whether to invest more funds in the wells at the time the decision was made to complete the wells. This election was supposed to be the major compensation he received for sale of his USEMCO stock to Wilson. Prior to December of 1980, Briggs had delegated management responsibilities at USEMCO to Wilson. Briggs did not tell the Respondents that he was intending to transfer to Wilson his interest in USEMCO, and took no further part in USEMCO's operations, having resigned as officer and director.

Wilson, who became the Chief Executive Officer of USEMCO in December of 1980, wrote to the Hagens in April 1981, without Briggs' knowledge or consent, to tell them that a different and more expensive well was to be substituted for one of the original wells in the Six Well Program. The new, more expensive well was the subject Scheble Well, with respect to which Briggs was convicted erroneously of fraud. In order for the Scheble Well to be drilled, USEMCO required that all costs, including completion costs, be paid in advance. The Hagens agreed to participate in the Scheble Well if the completion costs would be returned if the well was not completed, which is obviously more than reasonable. The Hagens contributed to the Scheble Well approximately $41,000.00 out of the $500,000.00 they had committed for the Six Well Program, plus an additional $84,000.00. Briggs had absolutely nothing to do with the Scheble Well, nor any of the negotiations leading to the Hagens' investment therein. In fact, Briggs had no knowledge of the Well, and made no representations with respect thereto.

The Hagens filed suit as a result of the losses incurred on the Six Well Program and the Scheble Well, as well as another program not at issue called the "Seven Well Program." Five wells of the Six

Well Program were dry holes. One well produced in uncommercial amounts. The Scheble Well was not completed, and the Hagens did not receive the refunds from Wilson and USEMCO as promised by Wilson. Wilson conferred with the Hagens on several occasions for the purpose of devising a plan by which the Hagens could get the costs of the Scheble Well returned to them. It was agreed, after several meetings, that the Hagens would invest in the Seven Well Program gas wells that were already producing. The Hagens were told that the producing wells would return to them the costs of the new investment and the completion costs for the Scheble Well, for which they were never reimbursed. The Hagens received only a small return of their money.

All of the events relative to the Scheble Well occurred after Briggs disassociated himself from USEMCO. At trial, both Respondents, Consuelo Hagen and her daughter, Lynn Youse (Lawrence Hagen passed away prior to trial), testified that Briggs had absolutely nothing to do with the Scheble Well. At trial, Ms. Hagen testified under questioning from Briggs' counsel:

> "Q. Okay. Similarly, he didn't have anything to do with the Scheble Well, did he?
>
> "A. He was not involved with the Scheble Well."

(Tr. 294) Ms. Youse similarly affirmed this by her own testimony:

> "Q. And you have heard the testimony that your mother gave her about the Coomer being put in there and the Scheble Well being put in there and she said Mr. Briggs didn't make any representation with respect to Coomer or Scheble. Would you agree with that testimony?
>
> "A. He didn't make any representations about them.
>
> "Q. With respect to the Coomer.
>
> "A. What do you mean?

"Q. Well, did Mr. Briggs tell you anything about the Coomer Well?

"A. No.

"Q. Did he tell you anything about the Scheble Well?

"A. No.

"Q. All right. Do you agree then that he didn't represent anything to you with respect to those two wells?

"A. That is correct."

(Tr. 364-365).

From this testimony, it is obvious that Briggs made no representations or misrepresentations regarding the Scheble Well. This is because he had no knowledge of the Scheble Well and was not a participant in any of the events leading to that investment by the Hagens.

THE RULING BELOW

On August 24, 1982, the Hagens filed suit against Briggs, Wilson, Ferguson, USEMCO, and its two wholly-owned subsidiaries, Energy Investments of Oklahoma, Inc., an Oklahoma corporation, and U.S. Energy, Inc., a Texas corporation, neither of which is significant for Briggs' purposes. The complaint was filed in the United States District Court For The Northern District of Texas, alleging violations of the following: 1933 Securities Act, 15 U.S.C. § 77(a) et seq., and Sections 5, 12(1) and (2); the Texas Securities Act, TEX.REV.CIV.STAT.ANN. Art. 581-33(A)(1) and § 33(A)(2); the Colorado Securities Act, Sections 11-51-106, 11-51-123(1); Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, and Rule 10b-5; real estate fraud under the TEX.BUS. & COMM.CODE § 27.01 (Vernon's Supplmt. (1986); breach of contract, and common law fraud.

All of the Defendants were acquitted of liability except with respect to the Scheble Well. The jury found that all of the Defen-

dants were jointly liable to each of the Plaintiffs for common law fraud and real estate fraud as to the Scheble Well. USEMCO was found liable for breach of contract for not reimbursing the Hagens for the Scheble Well completion costs. Punitive damages in the following amounts were awarded; $73,350.00 against USEMCO; $73,350.00 against Ferguson; $110,000.00 against Wilson; and $110,000.00 against Briggs. The parties had stipulated that the amount of actual damages relative to the Scheble Well was $125,118.49. Briggs was absolved of any liability concerning the Six Well Program and the Seven Well Program.

Both Briggs and the Hagens appealed to the Court of Appeals for the Fifth Circuit. The Respondents claimed that they were entitled to a Judgment N.O.V. on the federal and state securities law questions. Briggs contested the District Court's verdict, arguing that a finding of no fraud under state and federal securities statutes precluded a finding of Texas common law fraud and real estate fraud under the TEX.BUS. & COMM.CODE § 27.01, et seq. Briggs also appealed the punitive damage award as to him for obvious reasons.

The Court of Appeals reversed the District Court's award of judgment under Section 27.01 of the TEX.BUS.&COMM.CODE, but sustained the judgment against Briggs for common law fraud and punitive damages as to the Scheble Well.

The Fifth Circuit attempted to reconcile the holding of no fraud under both state and federal securities statutes, and the existence of fraud under common law through a letter written by Briggs to the Hagens on December 15, 1982. That correspondence, which dealt in part with the Six Well Program, reads in part:

> "Dear Mr. Hagan:
>
> "You should be receiving a letter concerning my resignation as Chairman of USEMCO, Parent to U.S. Energy, Inc. and Energy Investments, Inc. of Oklahoma. Please be informed that I am certainly participating in the six well package to

> its conclusion. My ownership, interest in, and future operations of these six wells has not changed and I am comfortable with the progress thus far. Since I have already resigned, the foregoing report is not official from the company but a letter from a fellow participant explaining my understanding of the progress thus far."

The Fifth Circuit stated that this paragraph was a misstatement by Briggs. His interest in the Six Well Program had changed, due to his casing point election. According to this casing point election, Briggs could wait to see whether or not wells in the Six Well Program were producing before deciding to invest. According to Ms. Hagen and Ms. Youse, they might not have made additional payments under the partnership agreement nor the added $84,000.00 for the Scheble Well.

Briggs' statement that his interest in the Six Well Program remained unchanged was thus purportedly the basis for recovery by the Hagens. Despite this, the Court of Appeals could locate no evidence whatsoever that Briggs' statement was made with the intention of inducing the Respondents to enter into a contract concerning the Scheble Well. The idea of the Scheble Well did not even exist until at least four months after the letter in question.

> ". . . Briggs testified that he had no advance notice of the Scheble-well substitution and that he had no communication with the plaintiffs regarding any aspect of the six well program after December. Both assertions are not only uncontradicted, but are confirmed by other testimony. Therefore, there was no basis for the jury to infer that Briggs had made any representation or promise with the intent of inducing the Hagens to enter into the Scheble-well venture . . ."

(Opinion, Court of Appeals, p. 8). The Court of Appeals also found that this correspondence dealt only with the Six Well Program. That Fifth Circuit Panel held that this letter was written to have the Hagens continue to participate in the Six Well Program after Briggs left USEMCO. Briggs submits that this holding is

irreconcilable with the facts as related on Page 8 of the Fifth Circuit's Opinion.

Extrapolating this illogic even further, the Fifth Circuit stated that the "misstatement" by Briggs in regard to the Six Well Program was relied upon by the Hagens when they decided to invest in the Scheble Well, four months after they received Briggs' letter as to his resignation, all without Briggs knowledge or participation. This is clearly irreconcilable with the elements that must be proved to establish common law fraud in Texas.

The Court of Appeals thus using tortured logic found that fraud was perpetrated by Briggs upon the Hagens, and that actual and punitive damages were validly assessed, all based upon events Briggs had no knowledge of. This is in spite of the Panel's own statement that Briggs knew nothing about the Scheble Well and made no representations with respect thereto.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The issues for review strike at the outer limits of when a person should be held to have committed common law fraud. As it currently stands, the Fifth Circuit has held that a person can be liable for actionable fraud for an event he had no control over or knowledge of—a patently absurd result under the common law of any jurisdiction. The Texas courts (like most states) and the federal courts applying Texas state law have held recently that the elements of common law fraud are such that the Plaintiff must prove that:

> ". . . (1) the charged party made a false material representation that consisted of either a positive untrue statement of material fact, concealment of a material fact, or nondisclosure of a material fact that the charged party had a duty to disclose; (2) the charged party knew that the material representation was false or made it recklessly without any knowledge of its truth; (3) the charged party made the false material representation with the intent that it should be

> acted upon by the charging party; (4) the charging party acted in reliance thereon; and (5) the charging party thereby suffered an injury . . ."

Chemetron Corporation v. Business Funds, Inc., 682 F.2d 1149, 1171-1172 (5th Cir. 1982), reh. den. en banc, 689 F.2d 190 (5th Cir. 1982), vacated on other grounds 460 U.S. 1007, 103 S.Ct. 1245, 75 L.Ed.2d 476 (1983); *South Hampton Co. v. Stinnes Corporation*, 733 F.2d 1108, 1120 (5th Cir. 1984). See also, *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983); *Custom Leasing, Inc. v. Texas Bank & Trust Co. of Dallas*, 516 S.W.2d 138, 142-143 (Tex. 1974); *Wilson v. Jones*, 45 S.W.2d 572, 574 (Tex.Comm.App. 1932, holding app'd). The Hagens admit that none of these elements was established and the Panel of the Fifth Circuit said as much in their opinion at page 8.

For Briggs to have committed common law fraud regarding the Scheble Well, he would have had to have made a misrepresentation about the Scheble Well; known that the material representation about the Scheble Well was false or made recklessly without any knowledge of its truth; made the false material representation about the Scheble Well with the intent that it should be relied upon by the Hagens; the Hagens must have acted in reliance thereon; and the Hagens must have suffered injury as a result of such reliance. These facts do not exist.

The Panel agreed in finding that Briggs' purported misstatement in his letter of December 15, 1980 concerned the Six Well Program and not the Scheble Well. The Scheble Well was not even contemplated in December of 1980. Despite the purported misrepresentation about the Six Well Program, Briggs was acquitted of any liability with respect to the Six Well Program, the very program the letter in question addresses.

Briggs' letter of December 15, 1980 did not mention or concern itself with the Scheble Well. It could not have dealt with the Scheble Well, since at the time it was written, Briggs had not the slightest inkling of the existence or possibility of the Scheble Well.

Since, as the Hagens have testified and as both lower Courts have found, Briggs did not know of the Scheble Well at the time he wrote the Hagens on December 15, 1980, he obviously as a matter of simple logic could not have withheld or concealed anything about the Scheble Well, so not even a failure to disclose can be charged against Briggs.

Both the District Court and the Court of Appeals found that Briggs committed common law fraud upon the Hagens by virtue of his letter of December 15, 1980, concerning the Six Well Program, which didn't mention the Scheble Well. In other words, these Courts have found that Briggs committed common law fraud as to a well he knew nothing about, and did not participate in, and did not have any control over. This is a clear misapplication of common law fraud.

To further compound the damage to Briggs, the Panel also let stand the verdict that Briggs was liable for punitive damages. If common law fraud is committed either with deliberate intent to maliciously or wantonly injure, *Trenholm v. Ratcliff, supra*, at 933, *Dennis v. Dial Finance & Thrift Company*, 401 S.W.2d 803, 805 (Tex. 1966); or if done with conscious indifference to the rights of others, *Trenholm v. Ratcliff, supra*, at 933, *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 920 (Tex. 1981); then punitive or exemplary damages may be assessed against the guilty party. See also, *Corpus Christi National Bank v. Lowry*, 662 S.W.2d 402, 405 (Tex.Civ.App.—Corpus Christi 1983, no writ). Since there was no common law fraud committed as to the Scheble Well, punitive damages were inappropriately awarded against Briggs. Certainly he cannot be said to have acted wantonly and maliciously with intent to injure when he didn't even know of the investment.

The negotiations which culminated in the Hagens' investing in the Scheble Well occurred after Briggs had left USEMCO. It was John Wilson, Briggs' successor, as Chief Executive Officer, that convinced the Hagens to invest in the Scheble Well. Despite the fact that the Hagens now claim that they would have invest-

ed differently had Briggs not made his misstatement in his letter of December 15, 1980, the Court of Appeals found that the Hagens were far from neophytes who were taken advantage of and preyed upon:

> "Briggs met twice with the Hagens and explained the investment to them at length. He testified that he told them most of what a prospectus would contain and furnished to them all the information that they requested. Mrs. Hagen acknowledged that all of the information they requested was provided and admitted that some additional information might have been given directly to her husband without her knowledge. Ferguson furnished to Jerome Miller, the Hagens' investment advisor, all of the information he requested and all of the information that had been given to the Hagens. Miller testified that he was experienced in reviewing oil and gas, and other tax shelter investments, and, to the best of his recollection, the information furnished to him regarding the six well program was equivalent to what he usually received.
>
> ". . . The testimony reflected their thorough analysis of the six well program, their methodical and pointed questions to Briggs, Wilson, and Ferguson, their requests for numerous documents, repeated consultations with Miller, and other evidence that might have led the jury to conclude that they were able to fend for themselves."

When a person has relied upon his own investigation, Texas law will not allow that person to later say that it relied upon the representations of others. *Laughlin v. Federal Deposit Insurance Corp.*, 657 S.W.2d 477, 483 (Tex.App.—1983, no writ), citing with approval *Kolb v. Texas Employers Insurance Association*, 585 S.W.2d 870, 872 (Tex.Civ.App.—Texarkana 1979, writ ref'd n.r.e.). See also, *Lone Star Machinery v. Frankel*, 564 S.W.2d 135, 138 (Tex.Civ.App.—Beaumont 1978, no writ); *M. L. Mayfield Petroleum Corp. v. Kelly*, 450, S.W.2d 104, 110 (Tex.Civ.App.—Tyler 1970,

writ ref'd n.r.e.); *Marcus v. Kinabrew*, 438 S.W.2d 431, 432-433 (Tex.Civ.App.—Tyler 1969, no writ); *Mason v. Mid-Continent Supply Co.*, 374 S.W.2d 922, 925 (Tex.Civ.App.—Fort Worth 1964, writ ref'd n.r.e.).

Accordingly, even if Briggs had made a misrepresentation about the Scheble Well, the Hagens would not have causes of action against him due to their own extensive and intensively thorough negotiations and investigations.

Briggs urges that Texas theories of common law fraud were incorrectly applied to him. The effect of the erroneous decision is amplified by the assessment of exemplary damages. These clearly erroneous holdings could and should be remedied by this Court to prevent an unwarranted judicial expansion of common law fraud to cases as remote as this. The law of the State of Texas and the Fifth Circuit is clearly contrary to the judgment against Briggs, and the evidence will not support the judgment. This is not a large case in the great scheme of things, but to one man, it is a matter of financial life or death. Briggs urges this Court to carefully consider his plight and the expansion of the doctrine of common law fraud to encompass matters beyond even the reach of the securities laws. Clearly, this is erroneous.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Briggs prays that this Petition for Writ of Certiorari be granted and a Writ of Certiorari issue from this Honorable Court to review the Judgment of the Court of Appeals for the Fifth Circuit. In the event that this Petition is granted, Briggs prays that the Judgment of the Court below as to the liability of Briggs as to common law fraud and

punitive damages be reversed, and that all other holdings of that Judgment be affirmed.

Respectfully submitted,

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By /s/ Khent H. Rowton
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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition for Writ of Certiorari to the United Sates Court of Appeals for the Fifth Circuit was placed in the U.S. Mail, Certified, Return Receipt Requested this _____ day of November, 1986 to the following:

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_____
Attorney For Petitioner

No. _____

In The

Supreme Court of the United States

October Term, 1987

James C. "Jack" Briggs,

Petitioner,

v.

Estate of Lawrence E. Hagen,
A. Consuelo S. HAGEN and Lynn G. Youse,

Respondents.

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IN THE

United States District Court

FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ESTATE OF LAWRENCE E. HAGEN,
A. CONSUELO S. HAGEN AND
LYNN G. YOUSE
Plaintiffs

v.

CIVIL ACTION NO.
3-82-1361-H

USEMCO, INC., A NEVADA CORP.,
ENERGY INVESTMENTS OF OKLAHOMA,
INC., AN OKLAHOMA CORP., U.S.
ENERGY, INC., A TEXAS CORP.
AND JOHN D. WILSON, JACK BRIGGS,
AND AALON FERGUSON, INDIVIDUALLY
Defendants

JUDGMENT

This case was tried before the Court and a jury May 28, 29, 30 and 31, 1985. On June 1, 1985, the jury returned its verdict, pursuant to which this Judgment is entered.

It appears to the Court that judgment should be entered on the verdict as to the Scheble well, each answer being supported by competent evidence, and that by reason of the verdict, Plaintiffs are entitled to recover actual damages of $125,118.49, plus prejudgment interest as special damages, plus exemplary damages based on the jury's findings of common law fraud and willful fraud under TEX.BUS.COM.CODE § 27.01 (actual

damages have been stipulated as to amount and the matters of prejudgment interest and attorneys' fees have been submitted to the Court by agreement of counsel). It further appears that an equitable and reasonable rate of prejudgment interest under the circumstances is ten percent compounded daily and that such interest to date of judgment is $67,827.99. The Court finds from the affidavits submitted by Plaintiffs' counsel that reasonable attorneys' fees and expenses should be awarded in connection with Plaintiffs' breach of contract claim against Defendant USEMCO, in the amount of $33,734.79 ($30,000.00 fee and $3734.79 expenses).

IT IS THEREFORE ORDERED, ADJUDGED and DECREED by the Court that Plaintiffs do have and recover of and from Defendants, jointly and severally, actual damages in the sum of $125,118.49 plus prejudgment interest in the amount of $67,827.99.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by the Court that Plaintiffs do have and recover the following exemplary damages:

$ 73,350.00 from Defendant USEMCO
$110,010.00 from Defendant John D. Wilson
$110,010.00 from Defendant Jack Briggs
$ 73,350.00 from Defendant Aalon Ferguson

IT IS FURTHER ORDERED, ADJUDGED and DECREED by the Court that Plaintiffs do have and recover of and from Defendant USEMCO only the additional sum of $33,734.79 for reasonable attorneys' fees and expenses.

IT IS FURTHER ORDERED, ADJUDGED and DECREED as follows:

All motions for judgment notwithstanding the verdict are **DENIED.**

Any and all relief sought and not specifically granted herein is **DENIED.**

SIGNED this 27 day of June, 1985.

/s/ Barefoot Sanders

BAREFOOT SANDERS
United States District Judge

IN THE

United States Court of Appeals
For The Fifth Circuit

NO. 85-1437

ESTATE OF LAWRENCE E. HAGEN, ET AL.,

Plaintiffs-Appellees, Cross—Appellants,

versus

USEMCO, INC., A NEVADA CORPORATION, ET AL.,

Defendants-Appellants, Cross-Appellees.

Appeals from the United States District Court For the Northern District of Texas

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(June 16, 1986)

Before RUBIN, POLITZ, and JOHNSON, Circuit Judges.
RUBIN, Circuit Judge:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes reedless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

A defendant appeals from a jury finding that his representations to investors in an oil and gas limited partnership constituted common law and statutory fraud. He argues that no evidence supports their verdict because the fraud involved a single well added to the partnership after he had disassociated himself from it. We find sufficient evidence from which the jury might have inferred that the defendant's false assurances amounted to common law fraud and, therefore, affirm that part of the district court's judgment. The evidence was insufficient, however, to establish statutory real estate fraud under Texas law, so we hold that the district judge erred in denying a judgment notwithstanding the verdict on that charge. We affirm the award of actual and punitive damages, which is justified by either finding of fraud. Finally, we deny the cross-appeal requesting a j.n.o.v. on the securities law violations of which the defendants were acquitted.

I.

In the early 1970's, after twenty years as a high school teacher, Jack Briggs left his job to try selling limited partnership units in oil and gas well drilling ventures. He was a successful salesman, despite a few skirmishes with the securities laws. These resulted in cease-and-desist orders and permanent injunctions from the SEC and the courts of ten states ordering him not to sell unregistered securities without full disclosures and compliance with all relevant securities regulations. Undaunted, he formed USEMCO, a corporation headquartered in Dallas, which, together with its two wholly owned subsidiaries, engaged in all aspects of promoting, syndicating and operating oil and gas well limited partnerships. Briggs shared responsibility with John Wilson and Aalon Ferguson.

On two occasions in July 1980, Briggs met with Lawrence and Consuelo Hagen, and their daughter, Lynn Youse, to persuade them to invest in a drilling program known as the six well program. The Hagens and Mrs. Youse had no prior experience in

investments of this type. Briggs told the Hagens that he was investing $500,000 of his own money in the program. Although Lawrence Hagen had died before the trial, Mrs. Hagen and Mrs. Youse testified that they participated in all of the meetings with Briggs, Ferguson, and Wilson, and that no one told them of the outstanding securities law injunctions. Briggs contradicted them, but his recollection was uncertain. The partnership interests were not registered with the SEC or under the securities laws of any state, and Briggs was not a licensed securities dealer.

In early August, after their tax lawyer, Jerome Miller, had reviewed the documents, the Hagens and Mrs. Youse agreed to invest $500,000 in the six well program. They paid ten percent down and, under the terms of the partnership agreement, were obligated to pay forty percent of the cost of each well when the drilling rig was moved onto the well site, and fifty percent when it was decided to complete the well for production.

Briggs did not mention that he was planning to sell his interest in USEMCO. By the end of July, he had delegated all management responsibilities to Wilson and began to set up a new company of his own. On December 8, 1980, Briggs sold all of his USEMCO stock to Wilson for $500,000 and a casing-point election on the six well program. This election entitled Briggs to wait until each well was drilled and tested before deciding whether to invest in it. Unlike the Hagens and the other six well investors, Briggs was not obligated to pay the cost of drilling an unsuccessful well.

On December 15, Briggs wrote to the Hagens, primarily to solicit an investment in his new company, but also to reassure them about the six well program. The letter begins:

> Dear Mr. Hagan:
>
> You should be receiving a letter concerning my resignation as Chairman of USEMCO, Parent to U.S. Energy, Inc. and Energy Investments, Inc. of Oklahoma. Please be informed that I am certainly participating in the six well

> package to its conclusion. My ownership, interest in, and future operations of these six wells has not changed and I am comfortable with the progress thus far. Since I have already resigned, the foregoing report is not official from the company but a letter from a fellow participant explaining my understanding of the progress thus far.

Because of the casing-point election, however, Briggs no longer had any funds at risk in the six well program.

In April, 1981, Wilson wrote to the Hagens to inform them that a different and more expensive well, known as the Scheble Well, would be substituted for one of the original wells in the program. Participation in the drilling of this well required payment in advance of all costs, including completion costs. The Hagens agreed, but insisted on a promise that the completion costs would be refunded if the well were not completed. Wilson accepted this condition. Altogether, the Hagens and Mrs. Youse invested in the Scheble Well about $41,000 of the $500,000 they had committed to the six well program, together with an additional investment of $84,000.00.

The six well program was unsuccessful. Five of the wells were dry or incapable of producing, and the sixth well produced little. The Scheble Well could not be completed, but the Hagens received no refund. After several meetings with Wilson, the Hagens agreed to invest in a series of already producing gas wells, the seven well program, in the hope that those wells would rapidly repay both the new investment and the Scheble Well completion costs. The profits from these wells fell sharply, and the Hagens received little money back.

In 1982, the Hagens and Mrs. Youse sued Briggs, Wilson, Ferguson, USEMCO, and its two subsidiaries. They alleged a variety of securities law violations, common law fraud, real estate fraud under § 27.01 of the Texas Business & Commerce Code, and breach of contract for failing to refund the Scheble well completion costs. The trial court issued meticulously prepared interroga-

tories that provided for separate findings as to each cause of action regarding the six well program, the Scheble well, the seven well program, and the breach-of-contract claim. These findings were further subdivided to specify the liability of each defendant to each plaintiff on every claim. The jury was instructed to consider the liability of each defendant separately.

Before the interrogatories were submitted to the jury, Briggs' attorney requested that Briggs not be listed as a defendant on any cause of action involving the Scheble Well, the seven well program, or the breach of contract. The trial judge agreed that Briggs could not be held liable for the seven well program or the breach of contract, but permitted the jury to consider claims against him based on the six well program and the Scheble well.

The jury found all defendants jointly liable to all plaintiffs for common law and real estate fraud regarding the Scheble well, and it found USEMCO liable for breach of contract in failing to refund the Scheble well completion costs. It awarded punitive damages of $73,350 against USEMCO; $110,010 against Briggs; $73,350 against Ferguson; and $110,010 against Wilson. The parties had stipulated the amount of actual damages for the Scheble well as $125,118.49. Only Briggs appeals.

II.

Boeing Co. v. Shipman[1] sets the same standard of review for a directed verdict and for judgment notwithstanding the verdict. We must consider all of the evidence in the light most favorable to the opposing party, and the motion may be granted only "[i]f the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict."[2] If there is "substantial

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[1] 411 F.2d 365, 373-75 (5th Cir. 1969).

[2] *Id.* at 374.

evidence" that might lead reasonable men to differ, the issue is for the jury and their decision must be upheld.[3]

A.

Applying this standard, we first assess Briggs' liability for real estate fraud. Section 27.01 of the Texas Business and Commerce Code[4] prohibits fraud in transactions involving real estate, including the sale of oil and gas well interests. Fraud is defined as:

> (1) [a] false representation of a past or existing material fact, when the representation is
>
> (A) made to a person for the purpose of inducing that person to enter into a contract; and
>
> (B) relied on by that person in entering into that contract; or
>
> (2) [a] false promise to do an act, when the false promise is
>
> (A) material;
>
> (B) made with the intention of not fulfilling it;
>
> (C) made to a person for the purpose of inducing that person to enter into a contract; and
>
> (D) relied on by that person in entering into that contract.

Although there was substantial evidence that Briggs might have violated this provision when he induced the Hagens to invest in the six well program, the jury acquitted him of this. Mrs. Hagen and Mrs. Youse both stated unequivocally that Briggs had made no representations to them about the Scheble well.

Briggs' letter of December 15 contained a deliberate misrepresentation in his assurance that, despite his departure, his "investment" in the six well program continued unchanged. Mrs. Hagen and Mrs. Youse testified that, had they been informed that Briggs no longer had funds at risk in the six well program, they

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[3] *Id.* at 37 4-75.

[4] Tex. Bus. & Com. Code Ann. § 27.01 (Vernon 1968 & Supp. 1985).

might not have made the further payments that they were obligated to make under the partnership agreement, and certainly would not have agreed to invest an additional $84,000 in the Scheble well. This testimony evidences the materiality of Briggs' misrepresentation and the plaintiffs' reliance on it. But no evidence whatsoever indicates that Briggs' misrepresentation was made for the purpose of inducing the Hagens to enter into a contract regarding the Scheble well. That well was not proposed until four months later. Briggs testified that he had no advance notice of the Scheble well substitution and that he had no communication with the plaintiffs regarding any aspect of the six well program after December. Both assertions are not only uncontradicted, but are confirmed by other testimony. Therefore, there was no basis for the jury to infer that Briggs had made any representation or promise with the intent of inducing the Hagens to enter into the Scheble-well venture. A directed verdict or j.n.o.v. would have been proper, and we reverse the judgment against Briggs on this count.

B.

The elements of common law fraud in Texas are a material false representation, made either with knowledge of its falsity or with reckless disregard for its truth, and with the intention that the defrauded party act upon it. The party must in fact act upon it and suffer loss as a consequence.[5]

Briggs' letter of December 15 contained an assurance that he knew to be false. Although the letter may have been primarily intended to promote Briggs' new venture, it was also intended to ensure that the Hagens would continue to cooperate in the six well program after Briggs' departure.

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[5] Trenholm v. Ratcliff, 646 S.W.2d 927, 930 (Tex. 1983); Custom Leasing, Inc. v. Texas Bank & Trust Co., 516 S.W.2d 138, 142-43 (Tex. 1974); Wilson v. Jones, 45 S.W.2d 572, 573 (Tex. Comm. App. 1932); Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149, 1171-72 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007, 103 S.Ct. 1245 (1983).

Briggs' casing point election on the six well program was a potentially valuable asset, but it depended on USEMCO's ability to drill the wells, which in turn depended on the good will and continued contributions of investors such as the Hagens. If the Hagens had lost faith in the partnership and failed to continue with the program, the four wells that remained to be drilled in December 1980 might have been delayed or forgone, and Briggs' casing point election on them would have been postponed or become worthless.

The jury therefore had an adequate basis to decide that Briggs intended the Hagens to continue their participation in the six well program, that he had a motive for doing so, and that he deliberately misled them. The jury might also have concluded that Briggs' misrepresentation was material, and that the Hagens participated in the Scheble Well in reliance upon it. Taking all inferences in the plaintiffs' favor, we affirm the judgment on this count.

C.

Briggs also asserts that the jury verdict is inconsistent because it found no fraud under federal and state securities laws, but at the same time found the nearly identical elements of common law fraud.

Our review of the jury verdict is restricted not only by case law but by the seventh amendment, which requires that we adopt whatever view of the case makes the jury's answers consistent. We may reverse only if we find that no possible interpretation is consistent, and if the inconsistency is such that the verdict will not support the judgment below, or any other judgment.[6]

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[6] Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S. 355, 364, 82 S.Ct. 780, 786 (1962); Smith v. Shell Oil Co., 746 F.2d 1087, 1092 (5th Cir. 1984); Griffin v. Matherne, 471 F.2d 911, 915 (5th Cir. 1973).

The elements of the plaintiffs' claim under Securities and Exchange Commission Rule 10b-5[7] and under § 11-51-123(1) of the Colorado Securities Act,[8] as properly set out in the jury instructions, are

> *First:* That the Defendants used the mails, or an instrumentality of interstate commerce, in connection with the purchase or sale of securities;
>
> *Second:* That in connection with such purchase or sale, the Defendants, either:
>
> A. Employed a device, scheme or artifice to defraud; or
>
> B. Made an untrue statement of a material fact, or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading; or
>
> C. Engaged in an act, practice or course of business which operated as a fraud or deceit upon any person in connection with the sale or purchase of a security.
>
> *Third:* That the Defendants acted knowingly, as that term is defined in these instructions, or with severe recklessness;
>
> *Fourth:* That the Plaintiffs relied on statements of Defendants found to be in violation of Rule 10b-5 and the Colorado Securities Act in making the sale or purchase of securities; and
>
> *Fifth:* That the Plaintiffs suffered damages as a result.

The elements of common law fraud, described above, are indeed similar.

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[7] 17 CFR § 240.10b-5 (1985). *See* Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1982). *See generally* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 96 S.Ct. 1375 (1976).

[8] Colo. Rev. Stat. § 11-51-123(1) (Supp. 1985).

We have held that the only evidence to justify Briggs' conviction for common law fraud regarding the Scheble well was the misrepresentation made in the letter he sent to the Hagens on December 15. At that time, the Hagens had already purchased their interest in the six well program, and the jury might have believed that the representations in that letter were not made "in connection with the purchase or sale of securities." The jury might also have found, however, that the representation was made with the intent that the Hagens continue to fulfill their obligations under the partnership interest they already owned, which included the payment of funds for the Scheble well. The jury might then properly have concluded that the plaintiffs acted in reliance on this misrepresentation when, four months later, they invested additional funds in the Scheble well even though, at the time the representation was made, it was not made in connection with a sale of securities. Therefore, the apparently conflicting findings are reconcilable, and we must uphold the verdict.

D.

The jury was instructed that, if they found either statutory or common law fraud, they might award exemplary damages. Although we reverse the statutory fraud finding, common law fraud entitles the Hagens to actual and exemplary damages.

Briggs challenges the basis for an award of punitive damages, arguing that any fraud was not committed with deliberate intent to injure the Hagens.[9] As Briggs' counsel concedes, however, this is not the only standard for punitive damages for common law fraud: conscious indifference to the rights of others also suffices.[10] There was sufficient evidence for the jury to have found that

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[9] Trenholm v. Ratcliff, 646 S.W.2d 927, 933 (Tex. 1983); Dennis v. Dial Finance & Thrift Co., 401 S.W.2d 803, 805 (Tex. 1966).

[10] Trenholm v. Ratcliff, 646 S.W.2d 927, 933 (Tex. 1983); Burk Royalty Co. v. Walls, 616 S.W.2d 911, 920 (Tex. 1981).

Briggs' actions were made with conscious indifference to the rights of the Hagens.

III.

The appellees cross appeal, asserting that they were entitled to judgment n.o.v. on the federal and state securities law violations, entitling them to rescission of their entire investment. It is undisputed that the partnership interests sold were unregistered securities. The burden of proving that these securities were exempt from registration because the offering was private falls on the defendants.[11] The appellees argue that the defendants did not carry this burden.

Whether securities are exempt from the federal registration laws turns on whether the offering was private or public. This depends on whether, as a practical matter, the persons affected needed the protection of the securities laws. Specifically, the defendants must establish that those to whom the security was offered were "able to fend for themselves"[12] and had no need of a registration statement because their knowledge and access to information rendered the statement superfluous. As a matter of law, this determination depends on consideration of the following factors, although other factors may be relevant, and no one of these factors is alone determinative: the number of offerees and their relationship to each other and to the issuer, the number of units offered, the size of the offering, and the manner in which it was conducted. The factfinder must also consider the sophistication and knowledge of the offerees, and their access to the information normally contained in a registration statement.[13]

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[11] Sorrell v. SEC, 679 F.2d 1323, 1326 (9th Cir. 1982); SEC v. Ralston Purina Co., 346 U.S. 119, 126, 73 S.Ct. 981, 985 (1953).

[12] SEC v. Ralston Purina Co., 346 U.S. 119, 124, 73 S.Ct. 981, 984 (1953); Swenson v. Engelstad, 626 F.2d 421, 425 (5th Cir. 1980).

[13] *See supra* note 12. *See also* Doran v. Petroleum Mgt. Co., 545 F.2d 893, 899-900 (5th Cir. 1977); Hill York Corp. v. American Int'l Franchises, Inc., 448 F.2d 680, 690 (5th Cir. 1971).

Whether the securities are exempt from Colorado Securities Act turns on the same factors,[14] with the added consideration that the securities be purchased for investment, not for resale.[15]

Securities are exempt from Texas registration laws if (1) the total number of securities holders does not exceed thirty-five, or there have not been sales of the security to more than fifteen persons in the twelve months preceding the sale at issue, and (2) the sale is made without a public solicitation, which turns on whether the offers and sales were made to sophisticated, well-informed investors, or investors who have a relationship evincing trust with the issuer, and who do not acquire the securities for resale.[16] In assessing the sophistication of the investor, one must consider his financial capacity, whether loss of the investment would be material compared to his total assets, his general knowledge of securities and investments, and his actual participation in other, similar investments.

The jury was instructed first to determine if the relevant securities laws were violated and, only if they found a violation, to determine whether the securities were exempt. They found no violation in each case, and so made no explicit finding that the securities were exempt. The instructions regarding a violation, however, included a full description of the criteria for exemption and a statement that the burden of proving the exemption was on the defendants. Finding that the securities were exempt was the only possible basis for finding that there was no violation and, despite the sequence in which the questions were set out, we must assume that the jury implicitly reached that conclusion.

The record does not reveal detailed evidence concerning each factor that might be considered under the several state and

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[14] *See* Lowry v. Ford Hill Investment Co., 192 Colo. 125, _____, 556 P.2d 1201, 1207-08 (1976).

[15] Colo. Rev. Stat. § 11-51-114(2)(i) (Supp. 1985).

[16] *See* Tex. Rev. Civ. Stat. Ann. art. 581-5(I) (Vernon Supp. 1986); Nicholas v. Crocker, 687 S.W.2d 365 (Tex. App. 1984).

federal tests for exempt offerings. Nevertheless, it contains ample evidence from which the jury might have inferred that all of the offerees were sophisticated, that fewer than fifteen were involved, and that they had access to the information that would have been contained in a registration statement.

Briggs met twice with the Hagens and explained the investment to them at length. He testified that he told them most of what a prospectus would contain and furnished to them all the information that they requested. Mrs. Hagen acknowledged that all of the information they requested was provided and admitted that some additional information might have been given directly to her husband without her knowledge. Ferguson furnished to Jerome Miller, the Hagens' investment advisor, all of the information he requested and all of the information that had been given to the Hagens. Miller testified that he was experienced in reviewing oil and gas, and other tax shelter investments, and, to the best of his recollection, the information furnished to him regarding the six well program was equivalent to what he usually received.

The Hagens' wealth was clearly reflected by testimony regarding their sale of a $5,000,000 ranch in Florida and their desire for substantial tax shelter. Although they were not experienced in oil and gas ventures, they had considerable experience in real estate development. The testimony reflected their thorough analysis of the six well program, their methodical and pointed questions to Briggs, Wilson, and Ferguson, their requests for numerous documents, repeated consultations with Miller, and other evidence that might have led the jury to conclude that they were able to fend for themselves.

The six well program was offered to only nine or fewer investors, each of whom was asked to invest $500,000. Briggs, Ferguson, and Wilson all testified that every offeree was a sophisticated and wealthy businessman. Other than the Hagens, all offerees had pre-existing investment relationships going back at least ten years with USEMCO, Briggs, or Wilson. All were

knowledgeable about oil and gas investing. The seven well program was offered to, at most, one offeree other than the Hagens, and that offeree was a major international CPA firm, described as extremely sophisticated.

The jury might well have concluded that all three offerings, the six well, Scheble well, and seven well programs, were private offerings exempt from all registration requirements under both federal and state laws. The units were large, the number of offerees was small, there was considerable personal contact between investors and principals, the investors were knowledgeable and sophisticated businessmen, and all of the information they requested was furnished to them. The Hagens supplemented their limited experience by the use of an experienced investment advisor, who found no information lacking. Although the Hagens purchased the securities intending to transfer a one-eighth share to their daughter, the jury might have found that they and the other offerees bought the securities for investment, not for resale. Fewer than fifteen offerees were involved, and the jury might have found that they generally had a "relationship evincing trust" with the issuer.

The appellees argue that the securities cannot be exempt because Mrs. Hagen claimed never to have seen information that would have been included in any registration statement, such as USEMCO's financial statements, or the list of pending securities-law injunctions. But the defendants were not required to prove that every item of information in a registration statement was actually furnished to the Hagens, only that the Hagens had access to the information. The jury might have believed that the Hagens would have had access to financial statements if they had requested them. Briggs was not apologetic about the injunctions at trial, but described them as the undeserved result of a nationwide purge of small oil and gas promoters, and prided himself on being one of the few operators allowed to stay in business at all. The jury may, therefore, have credited his

testimony that he did reveal the injunctions in his meetings with the Hagens.

For these reasons, the District Court's denial of a directed verdict or j.n.o.v. as to the common law fraud finding against Briggs, and as to the alleged securities law violations is AFFIRMED. The denial of a j.n.o.v. on Briggs' motion regarding Texas real estate fraud is REVERSED. The punitive and actual damages assessed by the jury against Briggs are AFFIRMED, and the case is REMANDED for modification of the judgment consistent with this opinion.

IN THE

United States Court of Appeals
For The Fifth Circuit

NO. 85-1437

ESTATE OF LAWRENCE E. HAGEN, ET AL.,

Plaintiffs-Appellees,
Cross—Appellants,

versus

USEMCO, INC., A NEVADA CORPORATION, ET AL.,

Defendants-Appellants,
Cross-Appellees.

Appeals from the United States District Court
For the Northern District of Texas

ORDER:

IT IS ORDERED that the motion of appellant for leave to file supplement to petition for rehearing is **GRANTED**.

/s/ Alvin B. Rubin

ALVIN B. RUBIN
United States Circuit Judge

IN THE

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ESTATE OF LAWRENCE E. HAGEN, ET AL.,

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versus

USEMCO, INC., A NEVADA CORPORATION, ET AL.,

Defendants-Appellants,
Cross-Appellees.

Appeals from the United States District Court
For the Northern District of Texas

ORDER:

IT IS ORDERED that the motion of appellant, James C. "Jack" Briggs for leave to file reply to appellees' response to petition for hearing is **GRANTED.**

/s/ Alvin B. Rubin

ALVIN B. RUBIN
United States Circuit Judge

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Appeals from the United States District Court For the Northern District of Texas

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ON PETITION FOR REHEARING

(AUGUST 13, 1986)

Before RUBIN, POLITZ, and JOHNSON, Circuit Judges.

PER CURIAM:

Seeking rehearing, James Briggs contends that one jury finding—that he is not liable under a theory of common law fraud for representations made in regard to the six-well project—is inherently inconsistent with another finding—that he is liable for

compensatory and exemplary damages with regard to the Scheble Well project. Because the jury's findings, carefully considered, are supported by the evidence and not inconsistent, the petition for rehearing is denied.

Briggs founds his argument entirely on two grounds. First, he contends that the only representations he made that might be construed as fraudulent concerned the six-well program before the Scheble Well was considered as a substitute site. Second, he asserts that he played no role either in the decision to substitute the Scheble Well for one of the original six wells or in USEMCO's efforts to convince the Hagens to invest additional amounts in the new well. He contends that, therefore, he cannot be found guilty of common-law fraud with regard to the Scheble Well unless he was guilty of fraud with regard to the six well project. Similarly, he argues that it is inconceivable that his actions relating to the Scheble Well could warrant exemplary damages in view of the fact that he made no representations about that specific well and he was not found liable for the losses the Hagens suffered as a result of their continued involvement in the original six wells.

If the misrepresentations Briggs made regarding his continued involvement in the six-well project were the only relevant evidence for determining whether he should be held liable for common law fraud, his logic would be compelling. As has been noted in our previous opinion, however, to convict Briggs of common law fraud it would have been necessary for the jury to find not only that Briggs knowingly or recklessly made material misrepresentations with the intention that the Hagens act upon them, but also that the Hagens acted upon those misrepresentations and suffered a loss as a conseqeunce. The jury may have exonerated Briggs from liability for the Hagens' losses only because it believed that the Hagens' continued involvement in that project was not caused by Briggs' representations. Consistent with that view, they may have also found that the Hagens would not have made an additional investment in the Scheble Well in the absence of Briggs' fraudulent representations.

Briggs' contention that he knew nothing of the Scheble Well does not necessarily absolve him from exemplary damages. Apparently, the jury found that Briggs acted "wantonly and maliciously" and either with "intent to injure" the Hagens or "with reckless disregard of the injurious consequences of his act to others."[1] The record amply supports such a finding. The fact that the specific injury that resulted may not have been foreseeable is immaterial, given that the type of injury certainly was.

For all of these reasons, the petition for rehearing is **DENIED.**

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[1] Corpus Christi National Bank v. Lowry, 662 S.W.2d 402, 405 (Tex. Civ. App. 1983).